***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

# In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1904.

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**No. 1401.**

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JANE O'DWYER, APPELLANT,

*vs.*

NORTHERN MARKET COMPANY AND THE DISTRICT OF COLUMBIA, APPELLEES.

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## BRIEF ON BEHALF OF APPELLANT.

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This is an appeal from a judgment in the Supreme Court of the District of Columbia on a verdict returned by a jury in said court by direction of the judge at the close of the plaintiff's testimony, to which exception was duly taken.

### Statement of Facts.

Suit was brought by appellant, plaintiff below, to recover damages from the market company and the District of Columbia for personal injuries suffered in consequence of slipping and falling on some green vegetable or other refuse matter on the sidewalk of Seventh street, between O and P streets, the market company owning the building abutting on the sidewalk and hiring 3 feet or so of the sidewalk next the curb to country people who, with the knowledge of the District, or notice equivalent to knowledge, were authorized by the market company to use the public sidewalk as an appurtenance to the market building

proper. The declaration filed on behalf of the plaintiff was framed as to two counts on the theory that this use of the sidewalk was illegal and was a nuisance, it being alleged that the market company unlawfully let out the sidewalk for hire to country people, from whom it exacted a daily tribute, and that the District permitted this illegal occupation and obstruction of the public street. Another count of the declaration was based on the theory that the market company, whose market house was situated at the corner of Seventh and O streets, and running thence down to midway of the block towards P street, treated the sidewalk as an approach to and part of its market, and that having so treated the same it occupied the same relation and had the same obligations with respect to its patrons, of whom the plaintiff was one, that it would have had if the accident had occurred inside the market house proper; and that the plaintiff having suffered injury by negligence of the market company in permitting the sidewalk to become filthy and slippery by reason of an accumulation of market truck thereon, was liable for the damages resulting therefrom, the liability of the District being based on its permitting such use of the sidewalk.

The evidence on behalf of the plaintiff tended to support all the averments of the declaration. It showed that the plaintiff had been for a long time a patron of the market company; that the market house extended along Seventh street, about midway the block, towards P street; that the market company, with the exception of two stores occupied by McIlveen and Taylor, owned all the property on Seventh street from O to P streets; that for a long time prior to and on the day of the accident hucksters and others on market days occupied the sidewalk on Seventh street, extending from O to P streets, with the exception of so much of the sidewalk as lay in front of McIlveen and Taylor's stores, said hucksters and others placing barrels, boxes, and trays on the sidewalk for a space of 3 feet and more from the

curb, and putting their fruit, vegetables, and garden truck on these stands, from which they offered them for sale to persons who might come to the market to buy (Rec. pp. 10 and 11); that these hucksters and others backed their wagons up wherever they could find space in front of either the market proper or the market house stores nearer P street, and that the market master collected 10 cents a day from these hucksters (Rec. pp. 11–14); that the barrels, boxes, trays, etc., on which they rested their goods came from a small vacant lot owned by the market company, adjoining the market house building (Rec. p. 11); that no attempt was made to clean said walk or keep it free from vegetable matter except after the market closed, when the market company, at varying intervals, cleaned the sidewalk and street (Rec. pp. 17 and 18); that complaints of the condition of the street had been made to the market company by at least one of its patrons during the summer of the accident and prior thereto; that on the morning of the accident the sidewalk, and especially the part on which plaintiff fell, and which was occupied by vegetable and fruit dealers, was in a very filthy and dirty condition about two hours before the accident, being partially covered with broken tomatoes, green vegetables, cabbage leaves, and other refuse of a kind and nature similar to the produce in which the hucksters lining the sidewalk dealt (Rec. pp. 17 and 18); that on the morning of the accident there were quite a number of persons attending the market, and that the plaintiff while walking along on her way to market, when in front of the store occupied by one Henrietta Cohen and owned by the market company, slipped on some green vegetable matter on the sidewalk between one of these stands and the Cohen store and had a severe fall, resulting in the breaking of an arm and a severe strain of the shoulder muscles (Rec. p. 11). The plaintiff testified that she was moving as carefully as she could in the crowd just before the accident, and that she never saw this vegetable matter until after she fell,

when she found herself lying in it, and that the sidewalk was covered with vegetable and fruit refuse such as the hucksters whose stands were as near as 2½ feet to where she fell were selling (Rec. p. 12). A lease was put in evidence between the market company and Henrietta Cohen for the rent of the store to Mrs. Cohen, said lease having this special condition at the close thereof:

> "It is understood and agreed that country traders and teams will be allowed to occupy the space in front of said store to the curb for displaying and selling goods, and that the clerk of the market will be allowed to collect for same and shall see that the space is cleaned up after the persons and teams have left" (Rec. p. 15).

Mrs. Henrietta Cohen, when asked whether or not she had given permission to hucksters to occupy the place immediately in front of her store, replied:

> "Why, I have nothing at all to do with them. We do not want to be bothered with them, and we do not bother with them."

Asked if there was any agreement when she entered her premises with reference to the occupation of this sidewalk in front of her store she replied: "Why, on the lease" (Rec. p. 14). The president of the market company, Jesse Wilson, was put on the stand and stated that the market company collected money, but he did not know exactly how much, from the hucksters and others occupying the sidewalk in front of its stores and market building. These collections were not made under any absolute understanding and he said in the nature of the case there could not be any agreement or understanding with them. It was not necessary to get any permit and he had no authority to permit them to occupy it, and no permission had been given by the defendants for such occupancy, but the hucksters came whenever they wanted and some one from the market company collected

from those who were on the sidewalk. Asked by what authority this collection was made, he replied: "Under authority that the party goes down there and he says 'I want so much—10 cents—for your standing here.'" He knew nothing about where the boxes and barrels came from and while president of the market company had not visited it for some time. When asked, "You only know that you get money from these hucksters," he replied, "Yes, that is what I am after" (Rec. pp. 13 and 14).

John Schneck, a vegetable gardener, testified that he had sold at the Northern Market since March, 1901, at first backing up wherever he could and paying 10 cents a day to the market master, while now he had a regular place on the sidewalk up against the market house building and not on the curb line and paid $1.50 per month (Rec. p. 15). In the course of the trial a witness was asked what if anything occurred after the plaintiff slipped and fell, and the witness replied: "Mrs. Cohen ran out from her door and said, 'I hope you will stop that now; see what you have done.'" This remark, the witness who had helped pick Mrs. O'Dwyer up testified, occurred within a minute after the accident and while they were helping plaintiff up (Rec. p. 16.) Objection being made to the answer and evidence along this line, counsel for plaintiff stated that it was their purpose to show as part of the res gestæ that Mrs. Cohen was complaining to the hucksters about their throwing things on the sidewalk. The court, however, struck out this answer and refused to permit further evidence along these lines, and its refusal is one of the grounds of exception taken by counsel for plaintiff to the trial below.

## Assignment of Errors.

1. That the court below erred in directing the jury at the close of the plaintiff's case to return a verdict in favor of each defendant, and subsequently entering judgment thereon in favor of each defendant.

2. That the court below erred in striking out the answer of the witness, Mrs. Williamson, to what was said by Mrs. Cohen when she ran out of the store immediately after the accident and while they were helping plaintiff up, and refusing to permit further questions on this line as not part of the res gestæ.

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## ARGUMENT.

Counsel for plaintiff (appellant) contend that the court below committed error in taking the case from the jury, and base this contention on the following grounds:

First. That the occupation of the sidewalk by the hucksters, by implied or express permission of the market company, who collected a toll from them therefor, was an illegal occupation and obstruction of the public streets, for which the market company is liable, having authorized it, and the District of Columbia for having suffered it with notice thereof, and that this illegal occupation and constantly recurring obstruction constituted a nuisance, for which the plaintiff having suffered special damage by reason thereof, and as a natural and probable consequence of the use to which said walk was put, is entitled to recover damages.

Second. That even if the occupation of said walk had been a legal and reasonable occupation the market company would be liable for the reason that having chosen to treat the sidewalk as an approach to and appurtenance of its market house building it owed the same duty to the plaintiff, one of its patrons, that it would have owed to her had she been in the market house building proper at the time of the accident by its invitation, and that the company was negligent in not seeing that the sidewalk corresponding to an aisle of the market was not in a safe condition for those it invited to patronize it, and that the District of Columbia is liable for a failure, with due notice, to see that these pub-

lic sidewalks, used as market aisles, were kept in proper condition.

Third. That the market company having assumed by the lease the control and all responsibility for the sidewalks which ordinarily, perhaps, might be the exclusive liability of the tenant, stands in the tenant's shoes, and has the same liability therefor to one injured in front of the premises that the tenant would have had but for such special agreement.

1. The fee of the streets of the city of Washington, it is settled law, is in the United States, and except by express authority of Congress even the permission of the District Commissioners for the occupancy and obstruction of the public streets would not be lawful (see District Commissioners *vs.* Washington Market Co., 6 App. D. C. 34).

By act of Congress of 1862 it is provided:

> "No open space, public reservation, street, or any public grounds in this city shall be occupied by any private person or for any private purpose whatever under a penalty of not more than fifty dollars nor less than twenty-five dollars per day for every day or part of a day any such place shall be so occupied,"

and the act of the city of Washington of 1856 declares:

> "It shall not be lawful for any person or persons to place or cause to be placed or allowed to remain any goods, wares, or merchandise, or any sign, box, barrel, or other obstruction on either the footways of any street or avenue further than four feet from the building line."

In the case of the District of Columbia *vs.* Monroe, MacArthur and Mackey's Reports, page 348, it was held that this act gave an implied license to merchants and others to place wares on the public street within 4 feet of their show windows, but that there was no authority whatever to occupy the sidewalk at any other places. The occupation of the hucksters in the present case was at the curb and not

immediately next to the store. By the act of Congress, approved January 26, 1887, authorizing the District Commissioners to make police regulations for the government of the District, they were directed in paragraph 8 of said act—

> "To prohibit the deposit upon the street or sidewalks of fruit or any part thereof, or other substance or articles that might litter the same or cause injury to or impede pedestrians."

By section 1, of article 8, of the Police Regulations of the District of Columbia, 1902 edition, it is provided:

> "No person shall throw, cast, deposit, scatter, or leave in or upon any street, avenue, alley, highway, footway, parking, or other public space in the District of Columbia, any dirt, mud, ashes, gravel, sawdust, shavings, hay, straw, offal, vegetable matter. . . . That licensed venders selling from stands or push carts upon the streets or other public places shall attach to such stands or vehicles a receptacle to contain refuse matter incident to their business."

These provisions are further reinforced in section 2 and section 3, paragraph A, of said articles. At this point it may be well to state that the market company is a private incorporation under a law giving authority for the organization of manufacturing, mercantile, and other companies.

A recurrent obstruction of the public streets, authorized and permitted as shown by the evidence in this case, constitutes an absolute violation of express statutory enactment regarding the occupation of the public streets, and the natural and probable consequence of such occupation would be and was to cause the sidewalk adjoining said market stands to be littered with green vegetables and to become in a slippery and dangerous condition that resulted in plaintiff's injury.

And while this direct statutory violation is shown, the stands in question would have been within the common-law definition of nuisance had not there been express law against the use made of the public streets. Dillon on Municipal Corporations says (sec. 657, et seq.):

h 783 and also page 1140

"The power of municipal corporations to establish markets and build market houses will not give an authority to build them on the public streets. Such erections are nuisances, though made by a corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon a street, although sufficient space is left for the passage of vehicles and persons. Such erections, it seems, may be legalized by express act of the legislature, but unless so legalized a nuisance erected and maintained by a public corporation may be proceeded against criminally or otherwise, the same as if erected by private persons. Statutes authorizing and legitimating obstructions upon the highways which otherwise would be nuisances are strictly construed and must be closely pursued. The principle that streets and public places, or the uses thereof, speaking generally, belong to the public is one of great importance. Because they are public, whether the technical fee be in the adjoining owner, in the original proprietor, or in the municipality in trust for the public use, any unauthorized obstruction of the public enjoyment is an indictable nuisance. The King can not license the erection or commission of a nuisance; nor in this country can a municipal corporation do so by virtue of any implied or general powers.

"A building or other like structure erected on a street without the sanction of the legislature is a nuisance and the local corporate authorities can not give a valid permission thus to occupy streets without express power of this nature conferred upon them by charter or statute. . . . A person erecting or maintaining a nuisance upon a public street, alley, or place is liable to the adjoining owner or other person who suffers special damage therefrom."

See, also, Angell on Highways, section 237.
Lutterloh *vs.* Cedar Keys, 15th Fla. 306.
State *vs.* Mobile, 5 Port. (Ala.) 279.
Columbus *vs.* Jacks, 30 Georgia, 506.
Savannah *vs.* Wilson, 49 Georgia, 476.
Ketcham *vs.* Buffalo, 14 N. Y. 374.



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Rex vs Russell 6 East 427.

As the District would be liable had they, as proprietors of a municipal market house building themselves, occupied or used the adjoining public sidewalk for market purposes, a fortiori is a private market company liable for an usurpation of the public streets and the grant of permission therefor to persons from whom as its quasi tenant it collects a daily tribute, and a municipality for permitting such a thing. It is idle in the light of the evidence in this case to contend, as counsel for the defendant market company may contend, that it is not expressly shown that the market company gave any express permits to hucksters and that they were not parties to the obstruction of the public streets. In the nature of the occupancy they could not make direct express written agreements with the more or less itinerant individuals, but they did give their sanction to all who chose to come, the streets were not occupied except in front of their property, they made the tenants of their stores expressly consent to occupation of the public streets, and they collected toll, and having reaped the benefit they can not now deny responsibility and escape liability.

So far as the District is concerned, having the authority and power and it being its duty, it could not suffer this occcupancy of the public streets without being liable therefor. This is settled in a long line of decisions, in Maryland beginning with Marriotts' case and ending with Cochrane *vs.* Frostburg, 81 Maryland, 54.

So far as concerns any contention that the obstruction was not a fixed, permanent affair, it is sufficient to say that the obstruction was a constant and recurring one, and during market hours as great as would have been a permanent structure, so that the case falls within the decision of this court in the case of Cissel *vs.* Thomas W. Smith and District of Columbia, in which it was held that the defendants were liable where lumber piled on the public street had fallen and injured the plaintiffs. As respects the injuries suffered by the plaintiff we think the doctrine res ipsa loquitur might apply to this accident, and further, that it is

within the rule of law of contemplation of consequence as set forth in Encyclopædia of Law, 2d ed., vol. 21, page 488:

> "A party is liable where injuries might have been anticipated or foreseen from the act or omission. It is not necessary that the party should have contemplated or even been compelled to anticipate the particular consequence which ensued or injuries sustained by the plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act or omission or that consequences of a general injurious nature might have been anticipated."
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> Milwaukee Railway Company *vs.* Kellogg, 94 U. S. 469.
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> Railway Company *vs.* Elliott, 149 U. S. 266.
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> "If the consequences were natural and probable their contemplation will be presumed."

From page 471, of same volume of the Encyclopedia, as to proprietors of public resorts: Reasonable care for prevention of injury requires a very high degree of foresight and vigilance.

That the natural and probable consequence of permitting a public sidewalk, which was likely to become crowded, as this one was, with persons pushing along on their way to market, to be littered with green vegetables, broken tomatoes, and slippery refuse would be to cause some one to slip and suffer a serious injury seems plain, and in any event certainly was a matter for the jury to determine.

If it be contended that it was but reasonable in the growth of a city to permit streets adjoining markets to be occupied by country vendors it is enough to say that the reasonableness or unreasonableness of such occupancy is for the legislature and not for the market company actually and the District Government impliedly or permissibly to say. If such use of the public streets is to exist it is better that that use should be sanctioned by legislative authority to exercise, with proper provisions for the regulation and supervision of said occupancy.* To say, as the lower court did, that per-

* See D. C. vs B & P R. 114 U. S. 453

sons living in cities must expect the dangers of cities, including such dangers as exist in this case, would be to prevent all municipal reforms and leave city dwellers to suffer any discomforts and dirty streets that the greed of corporations which exact toll from hucksters and neglect to keep public places clean, and the somnolence of the municipality, might make possible. The corporation counsel recognized the illegality of this occupation of the sidewalk when, after the trial of the case and notice of appeal, he by letter to the District Commissioners called attention to this use of the public streets, and said:

> "There appears to be no direct legislative authority to permit the use of this street by dealers in produce, and, in view of the injury complained of in this cause and the growth of the city necessitating the use of streets adjacent to markets, whether public or private, I submit for your consideration the questions whether it may not be desirable to obtain authority from Congress whereby you may be empowered to set apart such portions of streets and sidewalks as you may deem proper under appropriate restrictions for market house uses; and whether, if such legislation be undesirable, notice should not be given to this market company and to dealers using such sidewalks to refrain from this practice."

Under this recommendation the Commissioners suggested and Congress at its present session passed an act giving the Commissioners control over the public streets and permitting them, under regulations yet to be framed, to permit, at their discretion and with proper supervision, use of the streets for business purposes where necessary. But such posterior action can not remove the liability on behalf of the District and the market company for its acts and the gross negligence displayed in the care of the street in question.

All question as to contributory negligence is removed inasmuch as the injury was the result of a nuisance, though in the light of the testimony it is impossible to hold that

the plaintiff did not exercise ordinary care, and was not free from negligence, especially so far as concerns this not being a question for the jury, in view of the decision of the United States Supreme Court in Mosheuvel *vs.* District of Columbia.

2. The defendant market company having treated the streets as appurtenances to the part of its market house proper is under the same liability that it would have been under had plaintiff's accident been inside the market house proper. It treated a public street as an aisle or approach to its market house, and having so treated it the market company owed to her, as one of its patrons, the same obligation that it would have owed to her had the injury happened inside the market house proper. This obligation is well laid down by this court in the case of Claggett *vs.* Washington Market Company, 19 Appeals, D. C. 12. The District suffering, with knowledge, the market company to make the street over which it had control an approach to a part of the market company, was under the same liability as the market company and owed the same duty that the market company did to persons traversing the streets by their joint invitation.* The evidence shows that neither of the defendants exercised the slightest care to see that the streets were safe for travel and free from anything that might cause the same to be dangerous, and the fact that the danger in this case was caused by something on the surface of the streets renders the District not less liable than it would be where that danger arose as in the case of [redacted], and District of Columbia *vs.* Woodbury, 136 U. S. 450, by reason of some unevenness of the surface or some trap or other dangerous projection thereon. The testimony given by Mrs. Roman shows clearly that during the summer preceding the accident the street was in an habitually dirty condition by reason of refuse from the market stands, and that on the morning of the accident the sidewalk had been literally covered with refuse as long as

* Savannah vs Rollins 38 Ga 334.

two hours before the injury to the plaintiff. This was sufficient to make it a question at least for the jury as to whether or not the District had notice of the danger.

3. While the landlord ordinarily may not be liable for the building and sidewalk where he has leased the premises to a tenant, this rule is not applicable here for the reason that under the lease agreement whereby the premises in front of which the accident occurred were let the landlord expressly took on himself the duties and obligations ordinarily imposed upon the tenant, and for his own profit undertook to stand in the tenant's shoes. Having so undertaken, the duties incumbent upon him were those theretofore incumbent upon the tenant, and no citation of authority seems necessary to the effect that the tenant owes the duty of seeing that the sidewalk in front of and approaches to his premises are safe. Ency. Law 2d ed v 18 p 240-241

With respect to the exception on the score that witnesses were not permitted to give the complaint or exclamation or outcry made by Mrs. Cohen immediately after the accident, when she rushed out of her store to upbraid the hucksters for throwing things on the sidewalk, counsel for appellant contend that the court below clearly was in error, said evidence being admissible as part of the res gestæ, the same having been uttered at the time the plaintiff was being assisted from the ground, and within a minute of the occurrence, and the remarks in question being, as the record shows, apparently not narrative, but indignant remonstrance of one cognizant of the acts resulting in the injury.

Respectfully submitted.

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